(2)

No. 95-1873

In The

Supreme Court of the United States

October Term, 1995

GUY E. ADAMS, et al.,

Petitioners,

v.

CHARLIE FRANK ROBERTSON and LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the right to opt out of a plaintiff class action certified pursuant to Rules 23(b)(2), 23(b)(1)(A) and 23(b)(1)(B), *Alabama Rules of Civil Procedure*, is required by the Due Process Clause of the Fourteenth Amendment, where the relief sought and granted in the settlement, and approved by the trial court, provided primarily injunctive and other equitable relief, "not claims wholly or predominately for money judgments."

2. Whether non-resident members of this plaintiff class who have had written notice of the settlement, the opportunity to object, to participate and to be heard, in person or through counsel, who, at the fairness hearing, participated and were heard either through counsel, in person, or both, and objected to and actually litigated the adequacy of representation by the class representative and class counsel and the merits and fairness of the settlement, were denied due process because class members have no right to opt out of the settlement.

CERTIFICATE OF INTERESTED PARTIES

Petitioners are approximately 400 named members of the plaintiff class composed of policyholders of approximately 400,000 cancer policies insured by Liberty National Life Insurance Company.

Respondents are Charlie Frank Robertson, the plaintiff and class representative of the certified class constituting policyholders of approximately 400,000 cancer policies, and Liberty National Life Insurance Company ("Liberty National"),[1] the defendant and the insurer of those class members. In addition to the parties listed by the petitioner, Torchmark Corporation is the parent corporation of Liberty National.

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[1] Counsel of record for respondent Liberty National elected not to file a response to the Petition for Certiorari. This was based upon the belief that the arguments recited in the Petition are adequately rebutted by the appended opinions of the trial court and the Alabama Supreme Court.

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent Charlie Frank Robertson, as the class representative of the cancer insurance policyholders of Liberty National certified as a plaintiff class, urges this Court to deny the Petition for Writ of Certiorari seeking review of the judgment of the Alabama Supreme Court.

OPINIONS BELOW

The opinion of the Alabama Supreme Court was rendered on December 22, 1995, and application for rehearing was overruled on February 16, 1996. The opinion of the Alabama Supreme Court has not been published in the official reporter but appears as an appendix to the Petition. The findings of fact and conclusions of law and the order and final judgment of the Circuit Court of Barbour County, Alabama, were affixed as an appendix to the Alabama Supreme Court opinion appended to the Petition.

JURISDICTION

Jurisdiction of this Court to review by writ of certiorari is conferred by 28 U.S.C. § 1257. Jurisdiction is sought to be invoked based on a right claimed under the United States Constitution – an alleged violation of the Due Process Clause of the Fourteenth Amendment:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case clearly does **not** warrant review by this Court as shown by the opinion of the Alabama Supreme Court (App. 1a-20a); and by the exhaustive findings of fact and conclusions of law (App. 21a-92a) and final judgment of the trial court (App. 93a-106a), appended to the Petition.

The factual statement in the Petition is misleading, inaccurate, presents matters *dehors* the record,[2] treats Petitioners' unfounded suspicions as fact,[3] and varies substantially from the relevant facts of record as found by the courts below. Respondent adopts the findings below.

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[2] Editorial condemnation of the tort system in Alabama and especially of Class Counsel and the Circuit Court of Barbour County is not in the record and has no bearing on or similarity to this case, but is inserted to suggest some sort of impropriety or wrongdoing of which there is no evidence in this case. Appending the three editorials is both inappropriate and improper.

[3] Class Members, including Petitioners, were given ample time and opportunity to review all discovery and to respond to any evidence introduced by the class representative. The discovery issue was addressed and answered by the trial court and the Alabama Supreme Court: "In this case, the trial court, did in fact, *allow* limited discovery. . . . Also Class Counsel testified at the fairness hearing and was cross-examined at length by counsel for the objectors. . . . " (App. 19a) As testified, three individual lawsuits filed by Class Counsel were dismissed and those plaintiffs became class members. The net worth of Liberty National was established at $327 Million by substantial evidence, subject to cross-examination and an opportunity for rebuttal. (App. 72a) Although Liberty National filed a policy form to be offered as a settlement, that settlement policy form was never accepted as a part of the settlement.

Petitioners representing approximately 1/10 of one percent of class members challenge a class action settlement of claims for injunctive and other equitable relief and for monetary damages against the insurer arising out of the alleged fraudulent exchange of cancer insurance policies with limited benefits for older cancer policies without such limitations. The settlement approved by the trial court, after hearing, as fair, adequate and reasonable, provided substantial injunctive and equitable relief enjoining the challenged exchange practices; reforming the replacement policies to eliminate the limitations; enjoining denying future claims under replacement policies based on limitations; reinstatement of certain lapsed cancer policies; optional replacement of old policies with reformed new policies; freezing premiums until one year from the date of a final order; and requiring common pooling for rate purposes for the common benefit of all class members; and restitution of 150% of the overall loss of benefits to cancer victims resulting from the exchange. In addition to this primary injunctive and equitable relief valued at more than $40 Million,[4] the settlement also provided ancillary monetary relief for cancer victims totaling $11 Million plus an additional $4.5 Million as attorneys' fees plus expenses.

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[4] This "value" is in addition to certain other important injunctive and equitable relief for which there was no measurable dollar value or monetary cost to Liberty National ascertainable, e.g., common pooling, injunction halting exchange practices, option to exchange old policies for new reformed policies, etc. As the Alabama Supreme Court noted "because equitable relief has a 'value' based on money or has 'worth' does not make it monetary relief." (App. 13a)

The relief sought and afforded by the Settlement was primarily injunctive and equitable, supplemented by monetary damages for the cancer victims. As found by the trial court:

> The Court expressly finds that the primary relief provided for by the . . . Settlement, and the primary relief which would be justified by the alleged (but denied) conduct, is injunctive and further equitable relief in the nature of declaratory relief, reformation of certain insurance policies, and ancillary restitution. The provisions in the . . . Settlement for incidental monetary relief and supplemental extracontractual monetary relief are ancillary to the primary equitable and injunctive relief. (Pet. App. 97a)

Throughout the Petition, Petitioners erroneously imply (Pet. 2) and state (Pet. 21, 22)[5] that the class action is one "seeking predominately monetary relief" in an attempt to fall within the benefit of this Court's decision in *Phillips Petroleum Company v. Shutts*, 472 U.S. 797 (1985), that due process requires that an absent plaintiff be provided with an opportunity to remove himself by opting out of the class. This Court in *Shutts* specifically held "our holding today is limited to those class actions which seek to bind known plaintiffs **concerning claims wholly or predominately for money judgments.** We intimate no view concerning other types of class actions such as those seeking equitable relief." *Id.* at 812, n. 3. [Emphasis added]

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[5] E.g. "Although this action is clearly one predominantly seeking a money judgment, ... " (Pet. 21); "an action which is predominantly for money damages. . . . " (Pet. 22).

From its inception, this class action complaint based on the fraudulent exchange of cancer policies sought declaratory, injunctive and other equitable relief and damages. (First Amendment to Complaint, C. 61-65). The Second Amendment to Complaint sought the equitable remedies of reformation and restitution. The class representative sought "injunctive and declaratory relief" reforming the new cancer policies to provide all the benefits of the "old policy" as well as additional benefits first included in the "new policy;" and requiring Liberty National "to pay all claims for covered expenses . . . ignoring any purported limits placed" on radiation, chemotherapy and prescription drugs by the "new policies." (C. 220-222)

REASONS FOR DENYING THE WRIT

Review on a writ of certiorari "is not a matter of right, but of judicial discretion," to be granted "only for compelling reasons." Supreme Court Rule 10. Petitioners have failed to present any "compelling reasons" for the grant of certiorari. This petition does not fall within the character of reasons enumerated in Rule 10: It does not present a conflict among the lower courts[6] or with a

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[6] There is no conflict between this decision by the Alabama Supreme Court and decisions of the Eleventh Circuit. *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983), cited by Petitioners as conflicting, is factually distinguishable from the instant case. *Holmes* was an abuse of discretion case based on "the facial unfairness of the distribution of the [monetary] award," where the 8 named plaintiffs sought 1/2 of the "finite and relevantly small lump sum [settlement] fund," leaving the remaining 1/2 to 118 other class members.

relevant decision of this Court, or involve an important question of federal law that has not been, but should be, settled by this Court; and contains no suggestion of departure "from the accepted and usual course of judicial proceedings."

1. The relief sought and accomplished by the settlement approved by the trial court was primarily injunctive and equitable relief, with incidental monetary damages, and did not "concern[ ] claims wholly or predominately for money judgments."[7]

The relief sought and granted was based on a corporate "boardroom fraud" to exchange cancer policies with certain unlimited benefits for cancer policies with limitations on those benefits. The primary thrust of this litigation was to halt that practice – past, present and future – and to restore the policyholder class members to the position of their bargain. The injunctive and equitable relief accomplish this purpose. With the exception of the limitation placed on radiation, chemotherapy and prescription drugs, the benefits under the new replacement policies exceeded those under the old policies, justifying a higher premium charge, which the policyholders had agreed and were willing to pay for better coverage. Reformation assures better coverage by retaining all the provisions of the new policies with broader benefits and by reinstating the unlimited radiation, chemotherapy and prescription drugs benefits of the old policy. The bargain

[7] This Court's holding in *Shutts*, is "limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments." 472 U.S. at 812, n. 3.

has been restored by injunctive and equitable relief, including consideration for the higher premium through the form of enhanced coverage. The equitable remedy of restitution forced the defendant to disgorge benefits that would be unjust for it to keep, and at the same time reimburse all cancer victims (150%) for losses resulting from these limitations placed on the new policies. These same cancer victims were awarded incidental monetary relief for having been damaged by the rejection of their claims resulting from the limitations contained in the replacement policies.

The opinions of the Alabama courts clearly demonstrate the predominance of injunctive and other equitable relief. (Ala. Sup. Ct., App. 12a-13a; Trial Court, App. 39a-40a; 52a-56a), Final Judgment (App. 97a-101a).

As found by the trial court (App. 97a):

> The Court expressly finds that the primary relief provided for by the . . . Settlement, and the primary relief which would be justified by the alleged (but denied) conduct, is injunctive and further equitable relief in the nature of declaratory relief, reformation of certain insurance policies, and ancillary restitution. The provisions in the . . . Settlement for incidental monetary relief and supplemental extracontractual monetary relief are ancillary to the primary equitable and injunctive relief.

The Alabama Supreme Court responded to Petitioners' claim that the relief was primarily for monetary damages (App. 12a-13a):

> The relief awarded in the instant case included an order preventing Liberty National from

switching new policies for old policies without informing the insureds of the diminished benefits. Also, Liberty National was ordered to reform the "switched" new policies to include the benefits that had been provided in the old policies. Tellingly, the objectors point out in their brief that of the 400,000 class members, of whom 206,000 had policies fraudulently switched, less than 700 class members received actual money damages. "In other words, less than 1/4 of 1% of the class received money damages under the settlement." (Objectors' brief p. xxii.)

2. Petitioners submitted to the jurisdiction of the Alabama trial court by appearing and actually litigating the adequacy of representation by the class representative and class counsel and the merits and fairness of the settlement. See *In re Real Estate Title and Settlement Services Antitrust Litigation*, 869 F.2d 760, 771 (3rd Cir.), *cert. denied sub nom. Chicago Title Ins. Co. v. Tucson Unified School Dist.*, 493 U.S. 821 (1989) ("Of course, a party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action. . . . "); and *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2nd Cir. 1992), *cert. dismissed*, 506 U.S. 1088 (1993). ("*Shutts* mandates that a plaintiff be permitted to opt out of a proposed class when the court does not have personal jurisdiction over the plaintiff. . . . Here, [plaintiffs] have already submitted to the court's jurisdiction. Because there is no question that the court has jurisdiction over [plaintiffs], *Shutts* is inapposite. . . . ")

Here, the class members, including Petitioners and all non-resident or absent class members, were given written notice of the settlement, the opportunity to object, to participate and to be heard, in person or by counsel, and Petitioners, at the fairness hearing, participated and were heard either through counsel, in person, or both, and objected to and actually litigated the adequacy of representation by the class representative and class counsel and litigated the merits of the class certification and class action and fairness of the settlement.

Clearly, the non-resident Petitioners, by litigating these issues, have submitted to the jurisdiction of the Alabama trial court. Any defense of lack of jurisdiction over the person was waived by the non-resident Petitioners. See, *Martin v. Drummond*, 663 So.2d 937, 948 (Ala. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 1040, 134 L.Ed.2d 187 (1996).

In *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976), this Court defined due process:

> . . . The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner."

Further,

> . . . All that is necessary is that the procedures be tailored, in the light of the decision to be made, to "the capacities and circumstances of those who are to be heard," . . . to insure that

> they are given a meaningful opportunity to present their case.

Id. at 349.

Moreover, this Court in *Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 702 (1982) clarified that personal jurisdiction was an individual right subject to being waived:

> . . . The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty but as a matter of individual liberty. Thus, the test for personal jurisdiction requires that "the maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Company v. Washington*, 326 U.S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).
>
> Because the requirement of personal jurisdiction represents . . . an individual right, it can, like other such rights, be waived. . . .

Petitioners have not been denied or deprived of the due process guarantees of the U.S. Constitution.

CONCLUSION

The decision of the Alabama Supreme Court in this case is well-reasoned and eminently correct. The underlying decision and final judgment of the trial court documented a thorough investigation into this class action, the

relief afforded the Class Members and, based on a thorough analysis utilizing the appropriate factors, reached a sound conclusion and order that the class action settlement, as modified by the trial court, was fair, reasonable and adequate; and provided primarily injunctive and other equitable relief.

Clearly, Petitioners' rights to due process were not violated by refusal to provide them with the right to opt out of this Rule 23(b)(2) and/or 23(b)(1) class, which class certifications were proper.

Accordingly, Petitioners have failed to advance any reason, and clearly no "compelling reason" for grant of certiorari, and, for the foregoing reasons, it is respectfully submitted that their petition should be denied.

Respectfully submitted,

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